

**PROPOSED REVISIONS TO THE PEREMPTORY EXCUSAL RULES FOR THE
DISTRICT COURTS, MAGISTRATE COURTS, METROPOLITAN COURTS,
AND CHILDREN'S COURTS**

The New Mexico Supreme Court is considering whether to amend the peremptory excusal rules for all New Mexico state courts. The following advisory note explains the reasons for the proposed amendments and seeks input from the bench and bar before the Court takes further action.

The peremptory excusal rules continue to be a source of contention, requiring the courts to balance on one hand the rules' intended benefits of allowing litigants to avoid appearing before judges they may perceive, rightly or wrongly, to be unlikely to render impartial justice, and on the other hand, the rules' undesired effects of tactical judge-shopping, forced reassignments of judges from a division of the court by institutional blanket excusals, recusals of all judges in a district, additional costs in a time of fiscal crisis, delays in the timely conduct of merits litigation, and other problems. Before addressing the various proposals that have been made to abolish, retain, or modify the rules, the Supreme Court wishes to have the benefit of more data on the scope and patterns of the use of excusals, the reasons for their use, and their true impact on the administration of justice. The proposed amendments provide one of the mechanisms which can help gather that information. They would not change the current right of any litigant or attorney to excuse an assigned judge for any reason, or for no reason whatsoever. They simply propose to require the simultaneous submission of a form containing confidential information that will be analyzed only by the Supreme Court and its Administrative Office of the Courts, without disclosure to anyone else. Hopefully, within the course of a year or so, enough data will be gathered to present a clearer picture of what could or should be done with regard to the requests to reconsider the excusal rule. Comments addressing the particulars of this proposed study will be particularly welcome. There is no need at this time to address the broader issue of the desirability in the abstract of a peremptory excusal process, which may or may not be up for debate in potential future proposals at the conclusion of this factual study.

If you would like to comment on the proposed amendments set forth below before they are submitted to the Court for final consideration, you may do so by either submitting a comment electronically through the Supreme Court's web site at <http://nmsupremecourt.nmcourts.gov/> or sending your written comments to:

Kathleen J. Gibson, Clerk
New Mexico Supreme Court
P.O. Box 848
Santa Fe, New Mexico 87504-0848

Your comments must be received on or before August 30, 2010, to be considered by the Court. Please note that any submitted comments may be posted on the Supreme Court's web site for public viewing.

1-088.1. Peremptory challenge to a district judge; recusal; procedure for exercising.

A. **Limit on excusals or challenges; certification required.** No party shall excuse more than one judge. A party may not excuse a judge after the party has attended a hearing or requested that judge to perform any act other than an order for free process or a determination of indigency. A party shall certify on any peremptory election to excuse a judge filed under Paragraph C of this rule that the party has complied with subparagraph (2) of Paragraph E of this rule. The failure to include the certification or complete and mail the confidential report required by this rule shall not invalidate the excusal but may subject the party or the party's attorney to the imposition of sanctions at the sole discretion and initiative of the Supreme Court.

B. **Mass reassignment.** A mass reassignment occurs when one hundred (100) or more pending cases are reassigned contemporaneously.

C. **Procedure for excusing a district judge.** A party may exercise the statutory right to excuse the district judge before whom the case is pending by filing a peremptory election to excuse as follows:

(1) A plaintiff may file a peremptory election to excuse within ten (10) days after filing the complaint. A defendant may file a peremptory election to excuse within ten (10) days after the defendant files the first pleading or motion pursuant to Rule 1-012 NMRA.

(2) Any party may file a peremptory election to excuse within ten (10) days after the clerk mails a notice of reassignment on the parties or completes publication of a notice of a mass reassignment.

(3) In situations involving motions to reopen a case to enforce, modify, or set aside a judgment or order, if the case has been reassigned to a different judge since entry of the judgment or order at issue, the movant may file a peremptory election to excuse within ten (10) days after filing the motion to reopen, and the non-movant may file a peremptory election to excuse within ten (10) days after service of the motion to reopen.

D. **Notice of reassignment.** After the filing of the complaint, if the case is reassigned to a different judge, the clerk shall give notice of the reassignment to all parties. When a mass reassignment occurs, the clerk shall give notice of the reassignments to all parties by publication in the New Mexico Bar Bulletin for four (4) consecutive weeks. Service of notice by publication is complete on the date printed on the fourth issue of the Bar Bulletin.

E. **Service of excusal; confidential report to AOC required.** Any party electing to excuse a judge shall

(1) serve notice of such election on all parties; and

(2) complete and mail confidential report Form 4-106 NMRA to the Administrative Office of the Courts. Blank copies of the form may be obtained directly from the Administrative Office of the Courts or its web site. The Administrative Office of the Courts shall not disclose the completed form to any judge other than justices of the Supreme Court and shall provide the Supreme Court with reports of data compiled from the submitted forms.

F. **Recusal.** After the filing of a timely and correct exercise of a peremptory challenge, that district judge shall proceed no further. No district judge shall sit in any action in which the judge's impartiality may reasonably be questioned under the provisions of the Constitution of New Mexico or the Code of Judicial Conduct, and the judge shall file a recusal in any such action. Upon receipt of notification of recusal from a district judge, the clerk of the court shall give written notice

to each party.

[As amended, effective August 1, 1988; January 1, 1995; as amended by Supreme Court Order No. 07-8300-01, effective March 15, 2007; by Supreme Court Order No. 08-8300-38, effective December 15, 2008; as amended by Supreme Court Order No. _____, effective _____.]

Committee Commentary. — Reassignment of a judge usually occurs in individual cases in which a party has excused the judge or the judge recuses himself or herself. When this happens, the clerk easily can and does provide individual notice of the reassignment to the parties by mail.

When a judge retires, dies, is disabled, or the judge assumes responsibility for different types of cases (*e.g.*, from a criminal to a civil docket), large numbers of cases are reassigned and parties who have not previously exercised a peremptory recusal may choose to recuse the successor judge. Providing individual notice by mail to every party in each such case is administratively difficult, expensive and time consuming. Clerks sometimes provide notice of reassignment in an alternative manner—usually through publication in the New Mexico Bar Bulletin.

The 2008 amendment formally incorporates into Rule 1-088.1 NMRA the use of notice by publication in such a situation -- now identified as a "mass reassignment". The amended rule requires that the specified notice be published in four (4) consecutive issues of the New Mexico Bar Bulletin and provides that a party who has not yet exercised a peremptory recusal may do so within ten (10) days after the fourth and final publication.

When a judge's entire caseload is reassigned, the publication notice need not contain the caption of each affected case, but must contain the names of the initially-assigned judge and the successor judge.

There may be occasions when many, but not all, of a judge's cases are reassigned; for example when an additional judge is appointed in a judicial district and a portion of other judges' cases are assigned to the new judge. When this occurs, if the number of pending cases collectively reassigned exceeds one hundred (100), the 2008 amendment authorizes notice by publication. To assure that the parties have notice of which cases were reassigned, the court should either make a list available containing the title of the action and file number of each case reassigned, or not reassigned, whichever is less. The court may either publish such a list in the Bar Bulletin or publish a notice in the Bar Bulletin that directs the reader to the court's web site where the such a list will be posted.

Substituting publication for individual notice increases the chance that a party will not receive actual notice of a reassignment. Where actual notice is not achieved through publication, the trial court has ample authority to accept a late recusal. *See* Rule 1-006(B)(2) NMRA (providing that the court may permit act to be done after deadline has passed if excusable neglect is shown).

As with any other pleading filed in court, a peremptory election to excuse a judge must be signed by the party's attorney or, if the party is not represented by counsel, it must be signed by the party. *See* Rule 1-011 NMRA. All of the procedures for excusing a judge in Paragraph C are subject to the limitations in Paragraph A.

[Adopted by Supreme Court Order No. 08-8300-38, effective December 15, 2008.]
